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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO AS *AMICI CURIAE* SUPPORTING APPELLANTS

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This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women, many of whom are government employees directly affected by the statute at issue in this case. The American Federation of Government Employees, AFL-CIO ("AFGE"), is the national union affiliated with the AFL-CIO which specializes in representing federal employees.

ARGUMENT

Introduction and Summary of Argument

This case turns on the constitutionality of an act of Congress which prohibits the use of appropriated funds for certain purposes: § 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987) (hereinafter "§ 630").[1] More specifically, the question is whether the constitutional doctrine of separation of powers denies Congress the power to enact § 630. Such a ruling would be wholly unprecedented for the simple and compelling reason that judicial invalidation of such an enactment would be at odds with the most basic premises of our constitutional scheme.

It is beyond doubt that the grant of legislative powers to Congress in Article I of the Constitution on its face authorizes the passage of § 630. As we discuss *infra* at 12-20, that authority is stated in a number of Article I's express provisions. It is equally plain that in this instance Congress has not violated the separation of powers scheme by attempting to participate directly in the function of executing the laws, *see e.g., Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1, 109-143 (1976); *Myers v. United States*, 272 U.S. 52, 161 (1926), or by attempting to circumvent the Constitution's specific procedural requirements for proper legislative action, *see, e.g., INS v. Chadha*, 462 U.S. 919, 944-959 (1983).

Rather, in § 630, Congress has, in order to accomplish proper legislative objectives, simply placed a straight-

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[1] As a provision relating to appropriations for Fiscal Year 1988, § 630 effectively expired at the end of that Fiscal Year. However, Congress reenacted—and the President signed—an identical provision for Fiscal Year 19[illegible]. *See* Treasury, Postal Service and General Appropriations Act[illegible] 1989, § 619, Pub. L. No. 100-440, 102 Stat. 1721 (September 22, 1988). For convenience, both of these provisions will hereinafter be referred to as "§ 630."

forward limit on the Executive's uses of congressionally-appropriated funds: generally stated, that limit is designed to facilitate the free flow of non-classified information about the workings of our federal government, and to eliminate procedural obstacles to Congress' access to both classified and nonclassified information that Congress reasonably believes is necessary in carrying out its constitutionally assigned functions.

In this context, to strike down § 630 as unconstitutional, this Court would have to conclude that Congress' established legislative power is overridden by a superior power granted by the Constitution to the Executive. Moreover, because the Constitution does not expressly grant any such executive power, *see infra* at 23, the Court would have to *imply* a superior executive power that overrides the *express* powers granted to Congress in the Constitution. Not surprisingly, in the two centuries of our constitutional history, this Court has never sought to limit Congress' role in that fashion.

The power of the President sought to be invoked in this case as the base for overriding the power of Congress to enact § 630 is the power to conduct foreign relations and to protect national security. Specifically, the Government argues that as an incident of this presidential power, the Executive must—as a constitutional matter—have a free hand to control the flow of certain types of foreign relations and national security information as the Executice chooses, without any interference from Congress.[2]

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[2] The Government's argument for the President's exclusive and inherent authority to control the flow of information in these areas regardless of the will of Congress rests entirely on the assertion that such authority is implicit in the foreign relations and national security powers vested by the Constitution in the President. The Government's position is not based on the qualified privilege of confidentiality for high level executive deliberations. *See United States v. Nixon*, 418 U.S. 683, 705-707 (1974) (noting the qualified need

While this Court has from time to time alluded to an "inherent" or "independent" presidential power to conduct foreign relations and to protect national security, the context has always been presidential conduct pursuant to congressional authorization or wholly compatible with congressional enactments.[3] It does not strain the constitutional scheme one whit to recognize that in the area of foreign policy only the Executive branch has the power to execute—which means the power to conduct the functions of international discourse, negotiation, and war-making—and to recognize that Congress may, "in giving the Executive authority over [these] matters[,] . . . paint with a brush broader than that it customarily wields in domestic areas."[4] And, it may well be the constitutional plan with regard to foreign relations and national security to provide the Executive—at least in the absence of relevant legislative acts—a somewhat greater power of initiative in the formulation and implementation of policy than with regard to wholly domestic matters.[5]

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for confidentiality of high-level executive deliberations); *see also Nixon v. Administrator of General Services*, 433 U.S. 425, 456-55 (1977) (discussing privilege and its qualified nature).

[3] *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). *Accord, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 & n.2 (1952) (Jackson, J. concurring) (noting that *Chicago & Southern Air Lines, supra*, and *Curtiss-Wright* were both cases in which the presidential acts in question were "pursuant to an express or implied authorization of Congress"). *See also Department of Navy v. Egan*, —— U.S. ——, 108 S.Ct. 818 (1988) (noting broad presidential power over national security information in case where congressional enactments were *not* intended to limit presidential power).

[4] *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also Dames & Moore v. Regan*, 453 U.S. 654, 677-679 (1981).

[5] *See, Department of Navy v. Egan, supra*, 108 S.Ct. at 825 ("unless Congress specifically has provided otherwise, courts tradi-

But it in no way follows that the presidential power to conduct foreign policy and to protect national security is beyond regulation by Congress pursuant to the congressional powers conferred by Article I. This Court has never taken that quantum doctrinal leap—indeed, in the past, has declined to do so[6]—yet it is just such a departure in our constitutional jurisprudence that would be required to strike down § 630.

In his seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-638 (1952), Justice Jackson—analyzing an earlier presidential claim to "inherent" national security powers that could operate in the face of a contrary congressional will—put the issue framed here in proper constitutional perspective:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [*Id.* (footnote omitted)]

With regard to matters of the kind at issue here, the Founders provided for the "equilibrium" to which Justice Jackson refers not by attempting to capture the

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tionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *Haig v. Agee*, 453 U.S. 280, 291 (1981) ("in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval").

[6] *See Little v. Barreme* 6 U.S. 170 (1804) (Marshall, C.J.); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (Clark, J. concurring).

future by a set of rigid, definite rules for allocating power, but by establishing a creative competitive tension between Congress and the President that serves as the means of "keeping each other in their proper places." The Federalist No. 51 (J. Madison) (C. Rossiter, ed. 1961) at 320. It is through this political process—using the term political in its highest sense—that the shape of our government at the levels below the President and the shape of the policies of our Nation are to be formed.

The separation of powers concept most emphatically "did not mean that [the branches] ought to have . . . no *controul* over the acts of each other." *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 442, n.5 (quoting The Federalist No. 47 (J. Madison) (emphasis in original)). Any constitutional rule that would create a significant area of federal policy-making where the Executive has *exclusive* control, thereby truncating Congress' ability to exercise its express legislative powers, is far removed from the constitutional scheme. As long as Congress is acting in a legislative capacity as defined in Article I and the President is operating in an executive capacity as defined in Article II, only the most extreme circumstance could justify judicial intervention through the separation of powers doctrine.

The present case most assuredly does not meet that measure. As we show below, Congress in adopting § 630 acted well within its constitutionally assigned sphere. And, where Congress acts pursuant to its conferred powers, by definition the legislature is not acting in an area exclusively given to the President. As we further show, § 630 could not conceivably disrupt the ability of the President to carry out his constitutionally assigned functions. Indeed, § 630 does not even purport to alter the categories of information that the Executive may "classify." Nor does § 630 enlarge either the right of any government employee to disclose classified information or the right

of Congress to receive such information. The intended effect of § 630 is simply to prevent the Executive from chilling or obstructing the flow of information already permitted by pre-existing laws.

1. Section 630

The parties and other *amici curiae* will set forth in detail the legislative and administrative background to the enactment here and its implementation. It is important, however, that these details not obscure the purposes Congress sought to further in enacting § 630 and the precise scope of the constitutional dispute given the present posture of the case.

a. *Congress' Purposes*

Section 630, which was adopted as part of an omnibus appropriations measure, is captioned, "Employee Disclosure Agreements," and states as follows:

> Sec. 630. No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure

> manner as provided by the rules and procedures of the Congress;
>
> (5) imposes any obligations or invokes any remedies inconsistent with statutory law; *Provided*, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section. [101 Stat. 1329; emphasis in original.]

This provision was Congress' response to the Executive's recently-imposed requirements that persons with access to any classified information sign an agreement not to disclose classified or "classifiable" information, and that persons with access to information that involves, or is derived from, intelligence sources or methods sign nondisclosure agreements that additionally require prepublication review and prior written authorization for any disclosure relating to such intelligence information, sources, or methods. In the few years following the Executive's establishment of these nondisclosure agreement policies, close to three million current and former federal employees have been required to sign these forms.[7] These executive policies raised two basic concerns that Congress sought to allay in § 630.

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[7] Standard Form 189 was issued in September 1983 as a requirement for federal employees with access to classified information. By December 1987, approximately 2.5 million current and former employees had been required to sign this form. Form 4193 was issued in 1981 as a requirement for federal employees with access to information that relates to or is derived from intelligence sources or methods. By December 1987, approximately 453,000 current and former employees, excluding CIA employees, had been required to sign this form or closely related forms. *Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong. 2d Sess. 169-171 (August 10, 1988) (hereinafter "1988 Hearing") (statement of L. Rodrigues, Assoc. Dir., National Security and International Affairs Div., General Accounting Office).

First, Congress was concerned that use in the agreements of the term "classifiable," because of the vague and indeterminate nature of the term, would chill the free flow of *non-classified* information about the workings of our government. Congress believed that the free-flow of such information from those with the most intimate knowledge of the day-to-day functioning of the government is an important check on government abuses and furthers the goal of efficient and productive government.[8] Congress was particularly concerned that the chill on disclosures emanating from use of the term "classifiable" in these agreements would undermine the effectiveness of the whistle blower protections enacted as part of the Civil Service Reform Act of 1978. *See* 5 U.S.C. § 2302(b)(8) (prohibiting any reprisals by federal employers for an employee's disclosures of law or rule violations, instances of mismanagement or waste, or of other federal abuses of authority).[9]

Subsections (1) and (2) of § 630 are designed to deal with this concern, by limiting the nondisclosure agreements to classified information and to information in the process of classification.

Second, Congress was concerned that the prior authorization requirement might be used to deny individual lower-level government employees direct access to Congress. Over the years, Congress has concluded that effective legislative oversight of the vast federal bureaucracy, particularly the defense bureaucracy, cannot be

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[8] *See, e.g.*, H. Conf. Rep. No. 100-498, 100th Cong. 1st Sess. 1179 (December 22, 1987) (hereinafter "1987 Conference Report"); *Classified Information Nondisclosure Agreements: Hearing before the House Subcomm. on Human Resources of the Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 8 (October 15, 1987) (hereinafter "1987 Hearing") (statement of Sen. Grassley); *id.* at 26 (statement of Rep. Brooks); 1988 Hearing, *supra* at 4 (statement of Sen. Proxmire).

[9] *See, e.g.*, 133 Cong. Rec. H 11999 (Daily ed. December 21, 1987) (Rep. Brooks); 1987 Hearing, *supra* at 8 (statement of Sen. Grassley); *id.* at 14-15 (statement of Rep. Boxer).

wholly reliant on information provided in the institutionalized responses of the executive departments. Congress has recognized the natural tendency for any administration to disclose information to Congress in a selective and self-serving manner, as well as more calculated efforts by executive officers to suppress evidence that would be embarrassing to the administration. Because Congress may not on its own initiative and information know what to investigate or whom to subpoena, the Legislature has become increasingly dependent on disclosures volunteered directly by lower-level government employees, who may have intimate knowledge of abuses occurring in government and a willingness to disclose them. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 733-734 (1982). Indeed, Congress—to facilitate such disclosures—has enacted a number of statutes that encourage and protect these employees' access to Congress.[10] In § 630, Congress acted out of concern that the Executive's employee disclosure policy, and particularly the prior authorization requirement, might serve as a deterrent, a censor, or at least a filter with respect to the transmittal of the information to Congress.[11]

Subsections (3) and (4) of § 630 are explicitly directed to this concern. Congress' method in these subsections is not to define or expand the categories of information that employees were already entitled to convey directly to Congress but to prohibit the use of the prior authorization requirement, or any similar impediment,

[10] *See, e.g.*, Military Whistleblower Protection Act, Pub. L. No. 100-456, § 846, 102 Stat. 2027 (September 29, 1988); 5 U.S.C. § 2302(b) (whistleblower protection provisions of Civil Service Reform Act of 1978); 5 U.S.C. § 7211 (Lloyd-LaFollete Act of 1912). See generall, *Bush v. Lucas*, 462 U.S. 367, 389 & n.37 (1983).

[11] *See, e.g.*, 1988 Hearing, *supra* at 5-6 (statement of Sen. Proxmire); *id.* at 14-15 (statement of Rep. Boxer); *id.* at 87-88 (statement of Rep. Fascell); 1987 Hearing, *supra* at 8-9 (statement of Sen. Grassley); *id.* at 14-15 (statement of Rep. Boxer); *id.* at 26 (statement of Rep. Brooks).

as a means of obstructing the pre-existing statutory and constitutional "right[s]" of individuals to communicate with members of Congress and of Congress to obtain information directly from such individuals.

b. *The Scope of the Constitutional Dispute*

In the present posture of the case, the Executive is no longer resisting § 630's elimination of the term "classifiable" from the nondisclosure forms. Indeed, the Executive has removed the term "classifiable" from the forms. In their current form these agreements refer only to classified information or information that meets the standards for classification and is in the process of a classification determination. *See* Motion to Affirm at 9, 12-13 & 18-19; *see also* 53 Fed. Reg. 38279; 32 CFR § 2003.20(h)(1)(i).

Moreover, the Executive has issued regulations directing that the term "classifiable" in outstanding previously executed agreements be interpreted as referring only to "[u]nmarked *classified* information, including oral communications; and . . . *unclassified* information that meets the standards for classification and is in the process of a classification determination." Motion to Affirm at 6-7 (quoting 32 C.F.R. 2003.20(h)(1)(i) (emphasis in original)).

The Executive has, in addition, given persons who signed the old forms the option of nullifying the prior agreement and substituting a signed agreement on the new form. 32 C.F.R. § 7003.20(b).[12]

Thus, the agreement forms presently in use by the Executive and the administrative interpretation of the old forms are in conformity with subsection (2) of § 630

[12] Appellants claim that the Executive has not given those who signed the old form agreements sufficient notice of the present interpretation of "classifiable" or of the option of substituting the new form agreement. The constitutionality of § 630 does not weigh in the balance of that dispute; rather, the dispute goes to the question of the Executive's compliance with § 630.

and, to a large measure, in conformity with subsection (1).

The Executive, however, apparently continues to resist the requirement in subsection (1) that as respects unmarked information the nondisclosure form may only apply to information "*known* by the employee to be in the process of a classification determination" (emphasis added). The Executive has issued regulations stating that the forms will be interpreted to hold the employee responsible if the employee either knows or reasonably should know that the information is classified or is in the process of a classification determination. 32 CFR § 2003.20(h)(1)(i).

Assuming that subsection (1) of § 630 permits only a *subjective* knowledge requirement in the form agreements, the present dispute as to the validity of the first two subsections of § 630 reduces to whether Congress may limit the Executive's ability to protect the confidentiality of classified information through an *objective* "should have known" standard.

The dispute concerning subsections (3) and (4) concerns a question of *procedure*. These subsections do not create any new substantive rights of communication between individual government employees and Congress. Rather, § 630 provides in this regard that where such rights exist the Executive may not obstruct the individual—by a prior authorization requirement or other impediment—from communicating directly with Congress.

The issue with respect to these subsections is thus whether § 630 is constitutionally invalid because the provision denies the Executive the right to advance approval of the communications in question.

2. The Powers of Congress

Enactment of § 630 is well within the powers expressly given to Congress by Article I of the Constitution.

Because § 630 is drafted in the form of a prohibition on the use of appropriated funds, it is proper to begin with the appropriations power. Article I, § 9 of the Constitution, in unequivocal terms, confers exclusively upon Congress the power to appropriate federal funds: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

This power is sweeping. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not . . . previously sanctioned [by Congress]." *Reeside v. Walker*, 52 U.S. 272, 290 (1850).

The Founders were well aware of the significance of the power thus given to Congress. The power of the purse had after all been the means by which the British House of Commons had, in the 150 years prior to our Constitution's adoption, achieved "continual triumph . . . over the other branches of [British] government." The Federalist No. 58 (J. Madison) (C. Rossiter, ed., 1961) at 359.[13] Indeed, Madison pointed to the British experience as illustrating the point that the appropriations power is the ultimate legislative check on the power of the executive:

> [T]he purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. [*Id.*]

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[13] For reviews of this history, see H. Hallan, *The Constitutional History of England* 533-534 (1873); T. Tasswell-Langmead, *English Constitutional History* 428-429 (11th ed., T. Plucknett, 1960); Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U.L. Rev. 5, 6-8 (1970); 1988 Hearing, *supra* at 149-152 (legal memo by Prof. M. J. Glennon).

Madison went on to state:

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure. [*Id.*]

Indeed, so potentially powerful is the appropriations weapon in the process of pull and haul between the branches that the Framers felt constrained to put two explicit limits on its use against the other branches. The fair lesson of the narrow constraints chosen, however, is that the Framers envisioned all but the most extreme uses of the power to be valid. Thus, in Article II, § 7, the Constitution provides that the compensation of the President may not be diminished during his term. Hamilton explained that:

> It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, . . . reduce him by famine . . . to surrender at discretion his judgment to their inclinations. [The Federalist No. 73 (A. Hamilton) (C. Rossiter, ed., 1961) at 441.]

A similar exception was made for members of the Judicial Branch in Article III, § 1.

But there are no further express limits on Congress' ability to diminish appropriations for use by the Executive branch. *Cf. Embry v. United States*, 100 U.S. 680, 685 (1879) ("Congress has full control of salaries, except those of the President and the Judges . . . . The amount fixed at any one time may be added to or taken from at will.").

This Court has not strayed from the Founder's conception of the appropriations power as a potent legisla-

tive limit on executive power. Thus, in *Knote v. United States*, 95 U.S. 149, 154 (1877), the Court stated:

> Moneys once in the Treasury can only be withdrawn by an appropriation by law. However, large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, *as there is to all his powers*, it cannot touch moneys in the Treasury of the United States, except expressly authorized by Act of Congress. [(Emphasis added).]

And, in *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937), the Court declared:

> The provision . . . was intended as a restriction upon the disbursing authority of the Executive department . . . . It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.

Section 630 is a classic exercise of the appropriations power. Congress determined that no funds from the Treasury should be spent on a program desired by the Executive and opposed by Congress. The power to make just such a determination is precisely what the appropriations clause gives to the Congress.[14]

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[14] This Court has never held a congressional refusal to appropriate funds for the use of the Executive to be an unconstitutional interference with executive power. Indeed, the only invalidation of any congressional refusal to appropriate was *United States v. Lovett*, 328 U.S. 303 (1945), where the Court found that, under the guise of passing an appropriations measure, Congress had violated an express limit on legislative power found in the Constitution. Congress had accused certain named federal employees of disloyalty, tried them before a subcommittee hearing, and then barred them—by name—from any further receipt of their salaries from the Treasury. The measure was declared unconstitutional on the narrowest of grounds, that it was a bill of attainder, explicitly prohibited by Article I, § 9—*viz.*, " 'a legislative act which inflicts punishment without a judicial trial,' " *id.* at 315 (quoting *Cummings v. Missouri*, 71 U.S. 277, 323 (1866))—and as such, fell within those " 'certain specified exceptions to the legislative authority.' " 328 U.S. at 314 (quoting The Federalist No. 78 (A. Hamilton)). Thus,

The appropriations power is authority enough for Congress to have enacted § 630. But it should be understood that § 630 could as well rest on other powers expressly granted to Congress in Article I of the Constitution.

The correlative to the Article I, § 9 Appropriations Clause is the affirmative spending power set out in Article I, § 8 which grants Congress the power to "provide for the common Defense and general Welfare." The spending power is instinct with the understanding that Congress has a proper interest in every facet of government requiring funds from the Treasury.

In fact, precisely that interest motivated Congress in enacting § 630. Congress was concerned that the inhibitions on the flow of information from lower-level employees with intimate knowledge of government spending programs—particularly in defense spending programs—would deprive Congress of information needed to make sensible decisions as to which programs to fund and at what levels. *See, e.g.*, 1987 Hearing, *supra* at 14 (statement of Rep. Boxer) (noting need of House Armed Services Committee for information from military and civilian field personnel in its investigations of production and quality problems, overpricing and waste in weapons programs); *see also* notes 8 & 11 *supra*.

Closely related is Congress' authority to create, define, structure and limit the powers, and duties of the departments and offices of the Executive Branch. This grant of power is found in the "necessary and proper" clause of Article I, § 8, which follows the specific enumeration of the vast areas of Congress' legislative powers and grants Congress the additional power

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nothing in *Lovett* comes near to suggesting that there is some implied executive power that overrides Congress' discretion to decline to fund executive programs with which Congress disagrees.

> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof.

A leading commentator explained this congressional power to structure the government by noting that the Constitution provides directly for only the three institutions at the apex of the federal government—the Congress, the President, and the Supreme Court—and that

> [t]he remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control. [Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 667 (1984).]

Pursuant to Article I § 8 Congress has in fact created, defined and structured the departments and offices of the Executive Branch, including those executive departments and offices concerned with foreign affairs and national security. And, of particular pertinence here, Congress has often chosen to create structures that leave the President with less than complete control over the officers, employees, and resources of the Executive branch. Congress has done so in order to further one or another theory of sound governance in a ceaseless experiment to determine which of the enumerable possible approaches proves out in fact. *See, e.g., Morrison v. Olson*, —— U.S. ——, 108 S.Ct. 2597 (1988); *Humphrey's Executor v.*

United States, 295 U.S. 602 (1935); *United States v. Perkins*, 116 U.S. 483 (1886); *Kendall v. United States*, 37 U.S. 524, 610 (1838).

As we have seen, subsections (3) and (4) of § 630 reflect a congressional determination to structure the flow of information from the executive departments so that Congress would have direct access to communications from lower-level government employees and not be wholly dependent upon the institutional communications from the departments. It is well within Congress' authority to structure executive departments in this way so that the departments will be amenable to effective legislative oversight. As the Court stated in *Bush v. Lucas*, *supra*, 462 at 389:

> Congress has a special interest in informing itself about the efficiency and morale of the Executive Branch. In the past it has demonstrated its awareness that lower-level Government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates' freedom of expression. [(Footnote omitted)].

In addition to the general powers just discussed, Article I, § 8 contains numerous specific powers relating to foreign and national security affairs. Most prominent among these are the powers to "Provide for the common Defence," "regulate Commerce with foreign Nations," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." Given these numerous and broad powers, "there is surely no warrant for confident assertion that there is any matter relating to foreign affairs that is not subject to legislation by Con-

gress." L. Henkin, *Foreign Affairs and the Constitution* 76 (1972).[15]

These expressly delegated powers, in turn, provide additional reasons for Congress to be interested in and concerned about the substance of the information § 630 is intended to cover. Congress' legitimate interest in information extends to all subjects where "legislation could be had," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975). The powers, for example, to "declare War" and to "raise and support Armies" are among the most serious foreign relations and national securities matters on which a government can act. Article I, in terms shows that Congress is entitled to obtain for itself the information necessary for the Legislature to carry out its constitutional responsibilities in these regards in an informed manner.[16]

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[15] On the broad scope of Congress' foreign relations and national security policy powers, see generally L. Henkin, *supra* at 67-88. Not mentioned in text but, of course, also a major area of congressional foreign policy inteerst and authority is the Senate's responsibility to advise and consent on treaties. Art. II, § 2.

[16] The assertion that § 630 is an invalid interference by Congress with some "exclusive" executive authority over national security information is particularly puzzling given the Constitution's explicit grant to Congress of the power to "make Rules for the Government and Regulation of the land and naval forces." Article I, § 8. The employee disclosure agreements governed by § 630 cover military, as well as civilian employees, *see* 1987 Hearing, *supra* at 62 (statement of S. Garfinkel), and accordingly Congress' authority to make rules governing the former group—such as those in § 630—is unambiguously provided in the constitutional text. Moreover, given that the text so clearly grants to Congress the authority to regulate the governance of military personnel—a group that must, by its nature, include many of those most intimately involved with sensitive national security information—the assertion that Congress must, as a general matter, be deemed constitutionally unqualified to enact rules relating to others exposed to national security information is implausible.

Finally, as this case illustrates, there is a judgement that our society must make as to how to balance the unquestioned need for secrecy in certain foreign relations and national security matters with the need for the public and the legislature to be informed sufficiently so that the democratic process may function. The Constitution does not make that judgment in terms nor does it provide a source of law or a detailed blueprint of government from which the judiciary may do so. For this is a judgment as to how best to "provide for the . . . general Welfare," and the office of Article I, § 8 is to enable Congress to pass legislation making such judgments (subject of course to the President's veto power). Section 630 is precisely the kind of law making Article I § 8 contemplates. Out of the myriad of possibilities—each with its merits and defects—Congress has determined to leave undisturbed the President's ability to classify information, and has merely sought to facilitate the flow of nonclassified information to the public and to remove impediments to communications with Congress that lower-level employees were already entitled to make pursuant to pre-existing laws. Making policy on this level through the enactment of public laws is a quintessential congressional role in the constitutional scheme.

3. The Powers of the President

Having thus established that Congress was acting pursuant to expressly delegated powers and within its constitutionally assigned sphere in enacting § 630, what is left to consider is whether some power of the President overrides the congressional authority to enact that provision. *See* pp. 3-6, *supra*.

The district court in this case ruled that: "The statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." 688 F. Supp. 671, 685. That ruling appears

to be premised on the belief that "the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense." 688 F. Supp. at 684 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J. concurring)). The district court asserted that as an incident of that exclusive power "congressional intrusion upon the President's oversight of national security information [is required to] be more severely limited than might be required in matters of purely domestic concern." 688 F. Supp. at 685. That court concluded that "[s]ection 630 cannot be construed as consistent with this principle or with the President's recognized authority." *Id.*

There is no precedent in this Court that provides a predicate for the district court's ruling. This Court has *never* struck down an act of Congress as unconstitutional on the ground that the act regulated in an area of foreign relations or national security exclusively within the domain of the President. *See* pp. 4-5, *supra*. And, in our view, this case provides no occasion for a decision of such profound implications. The district court's decision is wrong for two basic and far less controversial and momentous reasons.

First, the premise that this case involves matters of foreign relations and national security policy that are *exclusively* within the realm of the Executive does not bear analysis. Merely to invoke the phrases "foreign relations" or "national security" does not tell us whether or not matters within the scope of congressional authority are involved. As we have seen, Congress has considerable powers in the areas of foreign relations and national security policy. In these areas, as in any other enumerated area, the point of Article I is to grant to Congress the power to legislate with respect to particular subjects. By definition, as to subjects where the Con-

stitution provides that Congress has the power to act, the President's power is *not* exclusive.

Thus, for example, as to any matter involving an expenditure of funds from the Treasury, the President's power cannot be exclusive. The President is Commander in Chief, but if Congress does not appropriate the funds, the President will have no army to command. Moreover, the size and composition of the army of the United States, the rules by which the army is governed and regulated, and the weapons at its disposal, are by the express terms of the Constitution for Congress to determine. And, of course, the ultimate question of war or peace also rests with Congress. How then can it be correct to say that such critical national security matters as the nature and extent of our armed forces and its weapons are the exclusive concern of the Executive? The answer is that the statement is plainly incorrect.

As a corollary, intelligence relating to weapons systems and to the military strengths and weaknesses of foreign nations is relevant to Congress' constitutionally assigned tasks, as surely as this intelligence is relevant to the tasks given to the President. For such intelligence informs the determination of what kind of army to field, and what kinds of weapons to fund.

Indeed, the intelligence gathering capacity of this nation is itself a concern of Congress. The President would have little of the sensitive intelligence the Executive is at such pains to protect if Congress did not appropriate funds for the agencies and mechanisms that gather that intelligence. In exercising its power to determine funding of the intelligence agencies, as with any other agency of the federal government, Congress has a legitimate need to know what those agencies are doing and what those agencies are producing.

The question, then, whether the matters at issue in this case are within the exclusive domain of the President is

answered simply by asking whether the Constitution expressly delegates to Congress the authority to deal with those matters. As we have already shown, *supra* at 12-20, Congress has ample constitutional authority to deal with the matters addressed in § 630. That authority necessarily negates any assertion that we are in a zone that is exclusively the President's.

This conclusion is reinforced by the fact that, on the Executive's side, the claim of authority to engage in the formulation of foreign relations and national security policy is one *by implication* rather than, as in Congress' case, a claim *by express* grant. Article II expressly confers upon the President the executive functions of the government, including specifically the authority to make treaties—with the advice and consent of the Senate—and to serve as Commander in Chief. In our system, however, executive functions do not necessarily include the sole or the paramount responsibility for the formulation of broad policy objectives, but normally only include the responsibility to implement policies determined by the Legislature.

With regard to purely domestic issues, the broad policies of the United States are arrived at through legislative enactments, not through unilateral determinations of the Executive. To be sure, in the areas of foreign relations and national security, we have implied a broader role for the Executive in the determination of the Nation's policies. See p. 4, *supra*. But the very fact that this role is is derived by implication from grants of authority, stated in general terms weighs heavily against too readily accepting assertions of presidential power that would preclude the exercise by Congress of powers expressly given to the Legislature. *See* The Federalist No. 41 (J. Madison) (C. Rossiter, ed. 1961) at 263 (condemning methods of constitutional interpretation under which "the more doubtful and indefinite terms [are] retained in their full extent, and the clear and precise expressions [are] denied any signification whatsoever").

This is not to say that in the area of foreign relations and national security the legitimate authorities of the President and Congress are congruent. There may well be parts of the foreign relations power that are the President's exclusively. For example, as part of the executive function, the President, and not Congress, is authorized to speak for this country in the discourse that takes place among nations. And, the Constitution specifically grants to the President the sole power to "make treaties," subject only to the later advice and consent by the Senate. It is surely arguable from that sequential plan that Congress lacks the power in the first instance to require the President to make, or not to make, a treaty. And, it may be that under certain circumstances the Constitution should be understood as providing the President exclusive control during the treaty negotiation process of confidential diplomatic communications that may come to him as part of that process and that may require continued secrecy in order successfully to complete the negotiations. *Cf.* The Federalist No. 64 (J. Jay).

But the question whether there are *some* areas of exclusive presidential control in foreign relations is a distinct question from whether the *particular* subject covered by § 630 is under exclusive presidential control. Since for the reasons already given, the answer to the second and narrow question is clearly "no," it would be improper to go so far afield to speculate on hypotheticals.

Second, even under the district court's sweeping conception of the presidential power involved here, it is difficult to understand how § 630 could be thought to "restrict the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." 688 F. Supp. at 685.

In *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 443 (1977), this Court stated the test that

must be met in order to strike down a statute on the grounds that Congress has prevented the Executive from carrying out its constitutionally assigned functions:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. [*See also, Morrison v. Olson, supra*, 108 S.Ct. at 2621.]

With respect to § 630, the first prong of this test cannot be met: § 630 does not in any realistic regard "prevent" the Executive from performing its constitutional responsibilities.

Section 630, we emphasize, does *not* diminish in any respect the Executive's ability to classify information that the Executive believes must be kept secret. Nor does § 630 create—or even purport to create—any new right or enlarge any existing right to disclose classified information or information in the process of a classification determination.

Section 630 *does* remove the chilling effect on the dissemination of *non*-classified information that resulted from the Executive's use of the term "classifiable" in the old nondisclosure forms. The Executive has already elimiated the term "classifiable" from the forms and by so doing has implicitly acknowledged that use of that term is not essential to the Executive's ability to provide for the national security. And, as to the remaining dispute concerning the proper knowledge test for unmarked material, the different consequences, in practical terms, between an "objective" and a "subjective" standard are not nearly sufficient to represent a real threat to the Executive's ability either to provide for the national security or to keep classified information confidential. (Indeed, it

is far from clear that § 630 is intended to preclude the Executive from taking disciplinary action against an employee who unknowingly but carelessly discloses unmarked information in the process of a classification determination.) And, in any event, § 630 in no way restricts the Executive from marking any such written material with a stamp stating that the material is in the process of a classification determination or taking such other steps as the Executive may deem appropriate to assure that employees know of the classification status of the information the employees are given.

Similarly, § 630 *does* remove procedural obstructions to communications to Congress by individual government employees. The communications affected by this part of § 630 are *only* those communications that individuals already have a right to make by virtue of pre-existing laws. The extent to which such preexisting laws authorize individual employees to disclose classified information to Congress may be unclear. *See* note 10 *supra* (citing statutes). But if the Executive's problem is with the scope of the communications authorized by other laws, the answer is directly to challenge those other laws, not to challenge § 630, which itself creates no right to communicate any information but only facilitates the exercise of such rights.[17] Given the provision's very limited function there is simply no basis for believing that § 630 prevents the Executive from performing its constitutionally assigned function.

Under the *Nixon v. GSA* standard, then, § 630's *de minimis* effects on the handling and disclosure of government information hardly raise the kind of threat to the proper functioning of the Executive necessary to strike

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[17] Of course, any such challenge to these other laws would have to meet the burden of specifying the classes of information that the Executive contends are immune from Congress' powers and of providing reasons why those specific classes of information must be—as a constitutional matter—under the exclusive control of the Executive.

down an act of Congress on separation of powers grounds.

4. A Note On The Interdependence Of The Legislative And Executive Branches

By constitutional design, whether in foreign or domestic affairs, the President and Congress are largely dependent upon each other if the government—and the Nation—are to accomplish anything of substance. Congress can make laws but needs the President to execute them. Congress can appropriate funds but needs the President to spend those moneys. The President, in turn, may be stymied if Congress refuses to appropriate funds that he requests or to pass the legislation he needs. As Justice Jackson noted, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. at 635 (Jackson, J., concurring).

Each branch ultimately must employ its *political* powers to influence the other branch to take particular courses of action. That is the nature of the "actual art of governing under our Constitution," *id.*, which "does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context," *id.*

Within our broad constitutional structure, the President must provide Congress sufficient reason, through information, negotiation, argument, or political pressure to convince Congress to make an appropriation, to pass legislation, or to ratify an appointment or a treaty. The political prosess will determine how much and what kinds of inducements must be provided.

In turn, Congress, equally responsible for the nation's welfare, must place its reliance on the President in order to attain its legislative goals. Congress, moreover, will be held politically responsible for its failure to provide

the President with sufficient resources and support to satisfy the nation's needs.

In this regard, as in all others, the two political branches of government have both legal (*i.e.*, express constitutional) and practical, structural strengths and weaknesses. *See, e.g.*, Black, *The Working Balance of the American Political Departments*, 1 Hast. Constit. L. Q. 13, 16-18 (1974). Two hundred years of experience demonstrates that the two protagonists are sufficiently well-matched that, at least so long as Congress acts as a legislature and within the prescribed forms, their contest produces the mix that the Founders envisioned of government action that comes from the fusion of Legislative and Executive powers and of individual liberty that comes from the diffusion of government power.

All this being so, since Congress did no more than exercise the legislative powers expressly granted by the Constitution, there is no occasion here for judicial alteration of the result that the Legislature mandated.

CONCLUSION

For the foregoing reasons, the decision of the district court in this case should be reversed.

Respectfully submitted,

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